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DIGEST OF OTHER RECENT VIRGINIA DECISIONS.**Supreme Court of Appeals.**

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

STANDARD PAINT CO. v. VIETOR & CO.

March 15 1917. Rehearing denied March 28, 1917.

[91 S. E. 752.]

1. Appeal and Error (§ 231 (2)*)—Demurrer—Failure to Point out Defect—Effect.—The overruling of a demurrer cannot be reviewed where the assignment of grounds of demurrer pointed out no defect which was under Code 1004, § 3272, subject to attack; special demurrers having been abolished.

[1 Va.-W. Va. Enc. Dig. 546.]

2. Appeal and Error (§ 231 (2)*)—Preservation of Grounds of Review—Misjoinder of Causes.—An objection that declaration after a trial amendment misjoined causes of action cannot be considered, not having been specified as a ground of demurrer, and defendant having pleaded not guilty.

[1 Va.-W. Va. Enc. Dig. 501.]

3. Sales (§ 425*)—Breach of Warranty—Remedy.—Trespass on the case is a proper remedy for breach of warranty as to the sale of personal property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1207, 1208.* 13 Va.-W. Va. Enc. Dig. 662.]

4. Action (§ 40*)—Joinder of Causes—Tort—Breach of Warranty.—Roofing sold plaintiff by defendant proving wholly unsatisfactory, plaintiff replaced it with other and sued for damages. The first two counts of the declaration were plainly in tort alleging deceit, guilty knowledge, and fraud, while the third count, though containing essentially the same allegations, set up a breach of warranty. Held, that the declaration after amendment so as to set forth the dates of the several contracts sued on was not subject to attack on the ground that it misjoined causes of action; the third count, trespass on the case, being proper remedy for breach of a contract of warranty, obviously being one in tort.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 320-327.* 1 Va.-W. Va. Enc. Dig. 137.]

5. Appeal and Error (§ 1041 (2)*)—Amendments—Effect of.—In an action for damages for fraud and breach of warranty in the sale of defective roofing, where the dates of the sales of the roofing were

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

alleged under a videlicet, the allowance of trial amendment to set forth the correct dates as established by defendant's testimony was no ground for complaint, the amendments being immaterial, as the dates need not have been proven as laid.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4107.* 1 Va.-W. Va. Enc. Dig. 367.]

6. Pleading (§ 237 (7)*)—Amendments—Allowance.—In such case the amendment, if material, was authorized under Code 1904, § 3384, declaring that, if at the trial of any action there appears to be a variance between the evidence and the allegations or recitals, the court, if it consider that substantial justice will be promoted, and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended on such terms as may be just, and Act March 27, 1914 (Acts 1914, c. 331), providing that the court may at any time, in the furtherance of justice, permit any proceeding or pleading to be amended.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 610, 617.* 1 Va.-W. Va. Enc. Dig. 348.]

7. Pleading (§ 248 (4)*)—Amendments—New Cause of Action.—In an action for damages for furnishing defective roofing which allowed water to escape into the building, where, though the sales were made on several different occasions, they were all made pursuant to a general representation that the roofing would be satisfactory and in a continuous course of dealing, a trial amendment to the declaration which inserted the correct dates of the several sales is not objectionable on the ground that each sale and warranty constituted a different and new cause of action, and that the amendments thus added new, separate, and distinct causes of action; for the several causes of action might properly be joined.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 701-706, 708½.* 1 Va.-W. Va. Enc. Dig. 348.]

8. Action (§ 40*)—Joinder—Different Transactions.—Where several causes of action arose out of purchases of roofing materials at different times, the purchaser may, in an action for damages for delivery of inferior materials, join his several causes of action in one declaration.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 320-327.* 1 Va.-W. Va. Enc. Dig. 135.]

9. Pleading (§ 230*)—Amendment—Statutes—Construction—Remedial Statutes.—Code 1904, § 3384, and Act March 27, 1914, relating to amendments in the interests of justice, being remedial, should receive a liberal construction.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 592.* 1 Va.-W. Va. Enc. Dig. 318.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

10. Sales (§ 437 (3)*)—Breach of Warranty—Actions—Recovery.—In trespass on the case for damages for false and fraudulent warranty made in a sale, the averment that the warranty was made with knowledge of its falsity need not be proven.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1253.* 13 W.-Va. Enc. Dig. 663.]

11. Appeal and Error (§ 882 (12)*)—Estoppel to Allege Error—Requested Instruction.—Where, on defendant's request, an improper instruction inconsistent with the correct instruction was given, defendant, not being injured, could not complain of the inconsistency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602.* 1 Va.-W. Va. Enc. Dig. 600.]

12. Trial (§ 312 (2)*)—Conduct of Court and Jury—Answer to Questions.—In trespass for breach of warranty, where the warranty was not only contained in a written instrument, but in correspondence between the parties, it was not error for the court, which had fully and accurately instructed the jury, to state in answer to the inquiry as to whether they were confined to the written guaranty merely that they should take into consideration the letters, the written guaranty, etc., and determine the contract from them all.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 744.* 7 Va.-W. Va. Enc. Dig. 711.]

13. Sales (§ 273 (3)*)—Guaranties—Implied Guaranties.—There is an implied guaranty that an article sold shall be reasonably fit for the peculiar use to which the vendor knows it is to be put.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 774.* 13 Va.-W. Va. Enc. Dig. 660.]

14. Sales (§ 260*)—Guaranties—Scope.—Where a seller of roofing executed a written guaranty reciting that, in case of leakage caused by any defect in the roofing or its application from ordinary careful use, the seller would make repairs immediately upon notice, and it appeared that the roofing was sold after the buyer had complained of other similar roofing, and correspondence as to its fitness passed between the parties and many repairs were made, the warranty as to the roofing was not restricted solely to the written guaranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 719-726.* 13 Va.-W. Va. Enc. Dig. 657.]

15. Evidence (§ 442 (6)*)—Parol Evidence—Attempt to Vary.—Where the warranty as to roofing was only partly contained in a written guaranty, it being modified by written correspondence between the parties, evidence of such correspondence and the conduct of the parties was admissible in its construction; it not being an attempt to vary a written instrument by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1877, 1886, 1887. 10 Va.-W. Va. Enc. Dig. 660.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

16. Appeal and Error (§ 1031 (1)*)—Disregard of Error—Statute.—Under Act March 27, 1914, entitled an act to simplify and expedite the administration of justice by the elimination of useless technicalities and vexatious delays, and providing that the court may at any time, in the furtherance of justice, allow any proceeding or pleading to be amended, and must disregard any error which does not affect the substantial rights of the parties, injury cannot be presumed from the fact of error, but must affirmatively appear from the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038, 4045, 4046.* 1 Va.-W. Va. Enc. Dig. 609.]

Error to Circuit Court of Richmond.

Action by E. K. Vietor & Co. against the Standard Paint Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

O'Flaherty, Fulton & Byrd and *Thos. B. Byrd*, all of Richmond, for plaintiff in error.

Willis B. Smith, of Richmond, for defendant in error.

EWELL v. BROCK.

March 15, 1917. Rehearing denied March 28, 1917.

[91 S. E. 761.]

1. Wills (§ 491*)—Construction—Powers of Court.—Where the will writing is complete in itself and its subject-matter is certain or the facts are ascertained, it is the duty of the court to construe it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1058* 13 Va.-W. Va. Enc. Dig. 781.]

2. Wills (§ 491*)—Construction—Latent Ambiguity—Questions for Jury.—Where at time of his death testator lived on a 60-acre farm and owned an adjoining 30-acre farm, and devised to his daughter "the farm on which I now live," there was a latent ambiguity, and the question what land was devised is for the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1058.* 7 Va.-W. Va. Enc. Dig. 858.]

3. Appeal and Error (§ 362 (2)*)—Scope of Review—Records—Sufficiency.—A petition for writ of error is a pleading, and must conform to the rules of pleading as to certainty and distinctness of allegation of errors relied on for reversal, or the errors will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1961.* 1 Va.-W. Va. Enc. Dig. 505.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.